

The opinion in support of the decision being entered today
is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte FRANK VENEGAS JR.

Appeal 2007-2844
Application 09/829,032
Technology Center 3600

Decided: August 15, 2007

Before ERIC GRIMES, LORA M. GREEN, and NANCY J. LINCK,
Administrative Patent Judges.

GREEN, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the Examiner's final rejection of claims 1 and 5-9. We have jurisdiction under 35 U.S.C. § 6(b). Claim 1 is representative of the claims on appeal, and reads as follows:

1. Support apparatus comprising:
 - a sign having a hollow, elongated post with a rectangular cross section and a plurality of spaced-apart through-holes; and
 - a base comprising
 - a hollow fillable body having a bottom portion adapted to rest on a ground surface and a top portion transitioning into a collar immediately above the fillable body,
 - the collar including a rectangular bore dimensioned to receive the cross section of the post and at least one aperture configured to align with one of the spaced-apart through-holes of the post when it is received into the collar, and
 - a fastener received by the aperture and through holes to hold the sign in an aligned, upright position.

The Examiner relies upon the following references:

Wilson	US 4,145,044	Mar. 20, 1979
Brault	US 5,220,740	Jun. 22, 1993
Ferrari	US 5,833,556	Nov. 10, 1998
Cragg	US 6,348,028 B1	Feb. 19, 2002

We affirm.

DISCUSSION

The Examiner has set forth three grounds of rejection over all of the claims:

- 1) Claims 1 and 5-9¹ stand rejected under 35 U.S.C. § 103(a) as being obvious over the combination of Brault and Ferrari (Answer 4);
- 2) Claims 1 and 5-9 stand rejected under 35 U.S.C. § 103(a) as being obvious over the combination of Brault and Wilson (*id.* at 5); and

¹ The Answer rejects claims 1 and 5-10 (*id.* at 4-6), but claim 10 was canceled (Br. 2, n. 1).

3) Claims 1 and 5-9 stand rejected under 35 U.S.C. § 103(a) as being obvious over the combination of Brault and Cragg (*id.* at 6).

As Appellant does not argue the rejections separately, and as the rejections are essentially the same, the following analysis applies to all three grounds of rejection. In addition, claims 5-9 stand or fall with claim 1 (Br. 2).

Brault is relied upon for teaching a support apparatus having “all of the limitations of the claimed invention except for the collar having one aperture and a plurality of spaced apart through holes.” (Answer 4.) Brault is also relied upon for its teaching that the support apparatus, *i.e.* base member, has a plurality of uses (Brault col. 2, ll. 63-66). Brault teaches that the support apparatus may be used as, for example, “as a stand for traffic signs, for supporting a post for various games such as for holding the basket in basketball, for holding a net in tennis or badminton games and for generally holding pictograms or shelves.” (Brault, col. 3, ll. 1-6.)

Ferrari, Wilson, or Cragg are relied upon for their disclosure of a base that is either fillable (Ferrari and Wilson) or weighted (Cragg), wherein the base has a collar having a aperture and a fastener, and for teaching a post having a plurality of spaced apart holes (Answer 4-6). The Examiner concludes that “[i]t would have been obvious to one having ordinary skill in the art to have modified Brault to hav[e] included the collar having an aperture, a fastener, and the post having a plurality of spaced apart through holes as taught by [Ferrari, Wilson or] Cragg for the purpose of adjusting the height of the stand to accommodate various heights when used as a basketball sign support, a traffic sign, a tennis net support or badminton game apparatus as discussed . . . [by] Brault.” (*Id.* at 6.)

“In rejecting claims under 35 U.S.C. § 103, the examiner bears the initial burden of presenting a prima facie case of obviousness. Only if that burden is met, does the burden of coming forward with evidence or argument shift to the applicant.” *In re Rijckaert*, 9 F.3d 1531, 1532, 28 USPQ2d 1955, 1956 (Fed. Cir. 1993) (citations omitted). In order to determine whether a prima facie case of obviousness has been established, we considered the factors set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1996); (1) the scope and content of the prior art; (2) the differences between the prior art and the claims at issue; (3) the level of ordinary skill in the relevant art; and (4) objective evidence of nonobviousness, if present. We conclude that the Examiner has set forth a prima facie case of obviousness, and the rejections of claims 1 and 5-9 over the combination of Brault and Ferrari, Wilson, or Cragg, are affirmed.

Appellant argues that although Brault does refer to the other applications of holding the basket in basketball, for holding a net in tennis or badminton games and for generally holding pictograms or shelves, “Brault *does not* infer different heights or height adjustability as the Examiner seems to imply.” (Br. 3 (emphasis in original).) Moreover, Appellant asserts, “the Examiner seems to imply that Appellant’s use of these features is for height adjustment but it is not; rather Appellant’s use of ‘through-holes,’ ‘at least one aperture’ and ‘a fastener’ is to hold the sign *in an aligned, upright position.*” (*Id.* (emphasis in original).)

Appellant argues further that Brault teaches “two perfectly acceptable post-holding structures, at least one of which includes features that teach away from any substitution.” (Br. 3.) According to Appellant, a concern of Brault is proper post rotational orientation, rather than height adjustment,

and “[s]ince none of the cited references provide any better solution in this regard, obviousness has not been established.” (*Id.*)

First, although Appellant may have used “through-holes,” “at least one aperture” and “a fastener” to hold the sign in an aligned, upright position, a finding of obviousness does not require that the motivation to combine references be identical to the Appellant’s to establish obviousness. *In re Kemps*, 97 F.3d 1427, 1430, 40 USPQ2d 1309, 1311 (Fed. Cir. 1996). As noted by the United States Supreme Court:

In determining whether the subject matter of a patent claim is obvious, neither the particular motivation nor the avowed purpose of the patentee controls. What matters is the objective reach of the claim. If the claim extends to what is obvious, it is invalid under § 103. One of the ways in which a patent’s subject matter can be proved obvious is by noting that there existed as the time of the invention a known problem for which there was an obvious solution encompassed by the patent’s claims.

KSR Int’l Co. v. Teleflex Inc., 127 S. Ct. 1727, 1741-42, 82 USPQ2d 1385, 1397 (2007).

Thus, while Brault may not specifically infer height adjustability, Brault does suggest different uses for his support apparatus, such as holding the basket in basketball, for holding a net in tennis or badminton games and for generally holding pictograms or shelves, which require some sort of height adjustability. As evidenced by Ferrari, Wilson, and Cragg, the use of a post having a plurality of spaced-apart through-holes was known to the ordinary artisan as a method of providing height adjustability.

Moreover, Ferrari, Wilson, and Cragg also demonstrate that the use of “through-holes,” “at least one aperture” and “a fastener” was known in the

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art as a means of attaching a post to a base, whether the base include a collar or another post (*see, e.g.*, Cragg, Figure 27). Thus, the ordinary artisan would have recognized that one could place an aperture in the collar of the support member, wherein the aperture lines up with one of the spaced-apart through-holes of the post, and then use a fastener to hold the post in an aligned, uptight position. *KSR*, 127 S. Ct. at 1740, 82 USPQ2d at 1396 (2007) (“[I]f a technique has been used to improve one device, and a person of ordinary skill would recognize that it would improve similar devices in the same way, using the technique is obvious unless its application is beyond his or her skill.”)

CONCLUSION

In summary, we find that the Examiner has set forth a *prima facie* case of obviousness, and the rejections under 35 U.S.C. § 103(a) are affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

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